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# Supreme Court of the United States

October Term, 1982

**No. 81-2406**

CITY OF POLSON, MONTANA,
*Petitioner,*

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF OF PETITIONER

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## ARGUMENT

In their Briefs in Opposition, both the United States and the Confederated Salish and Kootenai Tribes argue that the Petition for a Writ of Certiorari ought to be denied because it presents no issues of general or national significance. United States Brief in Opposition (hereinafter "U.S. Brief") at 8, 10; Tribes' Brief in Opposition (hereinafter "Tribes' Brief") at 7-8. This assertion, however, is belied by the fact that three states and a number of counties in several western states have submitted an amicus brief in support of the Petition. Brief of Lake County, Montana, et al. As pointed out in that amicus Brief, as well as in the Petition, this case not only concerns the status of the specific area in question but presents the general problem of defining the proper approach to questions of this type and the need for direction from this Court.

It is certainly true, as the Tribes state, that each case involving the question of reservation disestablishment must be decided on the basis of the statutes and historical circumstances peculiar to that case. Tribes' Brief at 8. However, it is equally true that most of the statutes at issue in such cases were enacted during the same historical period and embody the same administrative policy. Indeed, many share the same provisions and otherwise bear substantial similarities to one another. To say that questions concerning the effect of these statutes must be examined separately is surely not to

say that they must be viewed in an historical vacuum, isolated from one another and from their common circumstances. To the contrary, the establishment of general principles to guide the courts in their interpretations of such statutes is not only appropriate but necessary.

The Tribes contend that recent decisions of the Court have established "clear and precise principles" that require no clarification. Tribes' Brief at 3-4. Indeed, reviewing those decisions by themselves, the City might well agree. However, the Court's opinions have since received widely variant interpretations, a prime illustration being the argument presented by the Tribes in support of the lower court's opinion in the instant case. The approach taken by the Tribes, which essentially reiterates that of the Court of Appeals, reflects a strained reading of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and in fact, is directly at odds with the apparent meaning of that opinion.

The Tribes first point to the lack of language of cession in the 1904 Act at issue and assert that the "presence or absence" of such language is "a key indication of congressional intent." Tribes' Brief at 5. It is correct that the presence of language of cession is indicative of an intent to disestablish. Rosebud Sioux Tribe v. Kneip, supra at 592; DeCoteau v. District County Court, 420 U.S. 425, 445 (1975). However, it does not follow that the absence of such language signifies an opposite intent, as the Tribes apparently suggest. In Rosebud, for example, no such explicit language appeared

in the 1907 Rosebud Act, one of the three surplus lands acts found to have disestablishment effect. Id. at 608-09. Despite the total absence of explicit language of disestablishment, the Court stated that the substance of the 1907 Act was "identical" to that of the 1904 Rosebud Act, which contained cession language. Id. at 608. Furthermore, the Court explicitly noted that "the notion that such express language in an Act is the only method by which congressional action may result in disestablishment is quite inconsistent with [Mattz v. Arnett, 412 U.S. 481 (1973)]." Id. at 588 n. 4 (emphasis in original).

Similarly, the Tribes stress the absence of any agreement reached between the Indians and the government claiming that this Court in Rosebud emphasized "the presence of a cession agreement as a prerequisite to a finding of diminishment." Tribes' Brief at 5. Such a holding appears nowhere in Rosebud, and the opinion in fact clearly indicated otherwise. Of the three statutes at issue in that case, only one - the 1904 Act - was preceded by a formal cession agreement in accordance with treaty provisions.[1] 430 U.S. at 590-91. Even the latter agreement was not incorporated verbatim into the

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1. No agreement was negotiated as to the land opened by the 1910 Rosebud Act. 430 U.S. at 610. The 1907 Act was preceded by an agreement, but the agreement was consented to only by a simple majority rather than the three-fourths vote required by treaty. Id. at 606.

1904 Act, but instead was unilaterally altered by Congress.

It must be remembered that the focus in the context of reservation disestablishment is the intent of Congress. Rosebud, supra at 586-87. While it is true that Congress often opened Indian lands to non-Indian settlement by way of cession agreements or treaties with the Indians, this Court had established by 1904 that the same could be accomplished without Indian consent by unilateral act of Congress. See Rosebud at 587-88, 594; Lone Wolf v. Hitchcock, 187 U.S. 553, 594 (1903). As the Court in Rosebud stated, Congress was fully aware of this power when the Flathead Act was passed in 1904. Id. at 587-88, 593-94 & n.13, 595 n.17, 598 & n.19. Nevertheless, as this case demonstrates, lower courts continue to emphasize the presence of a cession agreement as a sine qua non to a finding of disestablishment.

The Tribes describe the school lands provision and the intoxicants provision of the Flathead Act as "isolated facts" which are "far outweighed" by more significant factors. Tribes' Brief at 7. However, the reading given nearly identical provisions in Rosebud suggests that the only logical conclusion to be drawn from such provisions is that disestablishment was intended by Congress. It would seem that these provisions, appearing on the face of the Act, would be highly salient factors this inquiry and would not easily be "outweighed" by the highly questionable arguments urged by the Tribes.

The Tribes also stress the contrast between the 1904 Presidential Proclamation opening a part of the Rosebud Reservation and the 1909 Proclamation opening the Flathead Reservation, and confess a failure to understand the City's argument on this point. It must be remembered that there were actually three Rosebud Proclamations - one implementing each surplus lands act - and neither the 1908 or 1911 Rosebud Proclamations contain cession language. See Proclamation of August 24, 1908, 35 Stat. 2203; Proclamation of June 29, 1911, 37 Stat. 1691. As the City stated in its Petition, these later Proclamations resemble the 1909 Flathead Proclamation, and differ from the 1904 Rosebud Proclamation in the same manner as does the Flathead Proclamation. In holding that all three Rosebud Acts had the same disestablishment effect, this Court did not attribute any significance to the differences between the first and subsequent Rosebud Proclamations, and the emphasis placed on similar differences between the first Rosebud Proclamation and the Flathead Proclamation is therefore entirely misplaced.

The United States makes the surprising suggestion that the issue at hand has been decided before, in the course of "[m]ore than forty years of litigation." Brief of U.S. at 9-10. To the contrary, however, the effect of the 1904 Act on the status of the original reservation had never been decided in any reported case prior to the District Court's first decision in this litigation in 1974. See State App., No. 82-22, pp. 167, 178. A careful

examination of the decisions cited by the United States reveals that none of them discuss the effect of the 1904 Act but indeed simply speak of the Flathead Reservation as if it continued to exist.[2] It is true that the Montana Supreme Court in 1951 decided that the State lacked jurisdiction over fee lands within the original reservation boundaries on the basis of 18 U.S.C. § 1151. State ex rel. Irvine v. District Court, 125 Mont. 398, 239 P.2d 272. However, the question presented here was not before the Court in that case since the State argued only that the lands were not "Indian country" because they had been patented in fee to non-Indians.[3] Other

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2. One of the early cases cited by the United States, which does mention the 1904 Act, is Pronovost v. United States, 232 U.S. 487, 489 (1914). In Pronovost, the Court took judicial notice of the continued existence of the Flathead Reservation, but by citing only those portions of the 1904 Act which reserved certain lands from settlement for the benefit of the Tribes, implied that the reservation existed only to the extent of those lands specially reserved. Id. at 489. Moreover, the Court clearly suggested that the City of Polson was no longer within the Flathead Reservation. Id. at 490.

3. This is an understandable argument in view of the fact that, until the revision of the Indian jurisdictional statutes in 1948, "Indian country" status was based on Indian title or exclusive Indian occupancy under Government supervision. See, e.g., United States v. McGowan, 302 U.S. 535 (1938); Clairmont v. United States, 225 U.S. 551 (1912); Browning v. United States, 6 F.2d 801, 802-07 (8th Cir. 1925); Ex Parte Ray, 54 F. Supp. 218,

than the previous decisions in this litigation, there is no judicial precedent which stands for the assertion that the 1904 Act did not operate to disestablish the original Flathead Reservation.

Despite the apparently clear holding of this Court, this area of the law continues to be plagued with uncertainty, continued litigation, and contradictory results. In view of the great jurisdictional significance such cases have for substantial portions of the western and central states, the situation is an appropriate one for the intervention of this Court.

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(cont.)
221 (W.D.N.Y. 1943); State v. Youpee, 103 Mont. 86, 61 P.2d 832, 833 (1936).

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petitions and the supporting Amici brief, the Petition for Writ of Certiorari should be granted.

Dated this 24th day of September, 1982.

Respectfully submitted,

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